UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS STEINBECK, an individual; and BLAKE SMYLE, an individual,

Plaintiffs and Counterclaim Defendants,

NANCY STEINBECK, an individual,

Intervenor-Plaintiff,

-against-

MCINTOSH & OTIS, INC., a New York Corporation; THE STEINBECK HERITAGE FOUNDATION, a non-profit New York corporation; EUGENE WINICK, an individual; SAMUEL PINKUS, an individual; JEAN ANDERSON BOONE, an individual; FRANCIS ANDERSON ATKINSON, an individual; WAVERLY SCOTT KAFFAGA, an individual and Executor of the Estate of Elaine Anderson Steinbeck; DAVID SCOTT FARBER, an individual; ANDERSON FARBER RUNKLE, an individual; JEBEL KAFFAGA, an individual; BAHAR KAFFAGA, an individual; and STEVEN FRUSHTICK, an individual; and Does 1-10,

Defendants and Counterclaim Plaintiffs.

MEMORANDUM DECISION AND ORDER
04 CV 5497 (GBD)

GEORGE B. DANIELS, District Judge:

Plaintiff Thomas Steinbeck filed a complaint alleging various state and federal claims against, *inter alia*, Defendant McIntosh & Otis ("M&O").[1] M&O filed an amended answer including a counterclaim relating to plaintiff's decision to partially terminate the literary agency

[1] Plaintiff Blake Smyle has not asserted any claims against M&O, and is not involved in the instant controversy.

with respect to non-literary works.[2] Thomas Steinbeck moved for summary judgment dismissing M&O's counterclaim and requesting declaratory relief that his partial termination of the literary agency was proper. M&O cross-moved for judgment on the pleadings. M&O's motion for judgment on the pleadings is granted. Plaintiff's motion for summary judgment on M&O's counterclaims is, therefore, moot.

Familiarity with the facts and parallel proceedings in this matter is assumed. Pursuant to a written agreement, John Steinbeck's widow, Elaine Steinbeck, received a one-half share in royalty distributions from copyright renewal interests for the domestic exploitation of certain works of John Steinbeck. His two sons from an earlier marriage, John Steinbeck IV and Thomas Steinbeck, received a quarter-share each. To resolve litigation between the parties, the widow and sons entered a settlement agreement in 1983 ("the 1983 Settlement Agreement") that, *inter alia*, apportioned royalty distributions into one-third shares and appointed M&O as the literary agent for John Steinbeck's works. Declaration of Plaintiff and Counterclaim Defendant Thomas Steinbeck in Support of his Motion for Summary Judgment on McIntosh & Otis, Inc.'s Counterclaim ("Thomas Steinbeck Decl."), June 15, 2006, Ex. 2.

On May 24, 2004, Thomas Steinbeck's counsel sent a letter notifying M&O that

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[2] By letter dated June 23, 2006, Thomas Steinbeck also purported to terminate his relationship with M&O with respect to any book publishing rights Thomas Steinbeck might acquire as a result of Judge Richard Owen's decision that the Notices of Termination Thomas Steinbeck and Blake Smyle served Penguin (USA) Inc. ("Penguin") were valid. Affidavit of Lacy H. Koonce III, Aug. 28, 2006, Ex. H. However, he sent this letter prior to the Second Circuit reversing Judge Owen's decision, and mandating the entry of judgment in Penguin's favor. *Compare Steinbeck v. McIntosh & Otis et al.*, 433 F. Supp. 2d 395 (S.D.N.Y. 2006), with *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008). M&O's second counterclaim, addressing the purported termination as to literary works, is moot because Thomas Steinbeck cannot terminate M&O as to rights he does not currently possess.

"effective immediately [M&O was] no longer authorized to represent [him] and [John Steinbeck IV's] motion picture, television and ancillary interests . . . ." Thomas Steinbeck Decl., Ex. 4.

"A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is analyzed under the same standard as a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *CBS Broad., Inc. v. Jones*, 460 F. Supp. 2d 500, 503 (S.D.N.Y. 2006). The Court assumes as true all factual allegations made by the non-movant and makes all reasonable inferences in the non-movant's favor. *United Res. Recovery Corp. v. Ramko Venture Mgment.*, 584 F. Supp. 2d 645, 651 (2d Cir. 2008). "[A] court may consider the pleadings and attached exhibits, statements, or documents incorporated by reference, and matters subject to judicial notice." *Life Product Clearing LLC. v. Linda Angel*, 530 F. Supp. 2d 646, 652 (S.D.N.Y. 2008). "Bald contentions, unsupported characterizations , and legal conclusions are not well-pled allegations and will not defeat a motion." *Id.* (citations omitted).

Thomas Steinbeck argues that Elaine Steinbeck obtained the ability to terminate M&O, at her sole discretion, pursuant to a personal services contract that ended when the power of attorney was extinguished, and that the power of attorney he signed became obsolete upon her death. Plaintiff provides no other basis for the argument that a power of attorney would be needed to permit Elaine Steinbeck to terminate M&O's agency, except that the last line of Paragraph 5 of the 1983 Settlement Agreement necessarily refers to every provision within Paragraph 5.

Paragraph 5 of the 1983 Settlement Agreement reads as follows:

> 5. The Parties hereby appoint M&O as their literary agent to administer in the future, as it has in the past, all copyrights and rights deriving therefrom in the works of John Steinbeck. *Said appointment shall be terminable solely at the discretion of Elaine*

> *Steinbeck.* Elaine Steinbeck and/or her agent shall have the complete power and authority to negotiate, authorize and take action with respect to the exploitation and/or termination of rights in the works of John Steinbeck in which John Steinbeck IV and Thomas Steinbeck have or will have renewal or termination rights. *In order to effectuate the terms of this Paragraph,* John Steinbeck IV and Thomas Steinbeck Steinbeck shall each execute, simultaneously with the execution of this Agreement, an irrevocable power of attorney in favor of Elaine Steinbeck . . . .

Thomas Steinbeck Decl., Ex. 2. (emphasis added).

The interpretation plaintiff suggests is contrary to "[t]he [primary] purpose of a written power of attorney [which] is not to define the authority of the agent as between himself and his principal, but to evidence the authority of the agent to third parties with whom the agent deals." *In re Estate of Anyon*, 244 N.Y.S. 244, 248 (N.Y. Sur. 1930). It would appear nonsensical that a power of attorney would be necessary to evidence to M&O, the agent, that it could be fired by Elaine Steinbeck, the principal. Further, M&O was intimately involved in the process: M&O stood to benefit from both an appointment contained in the 1983 Settlement Agreement and from Thomas Steinbeck's stated forbearance of his right to assert previously unasserted claims against M&O for breach of fiduciary duty. Although, M&O was not a signatory to the 1983 Settlement Agreement, M&O received a general release from both sons as a result of the agreement.

There is no indication that the power of attorney Thomas Steinbeck provided to Elaine Steinbeck was necessary to effectuate her discretion to terminate M&O. The execution of the 1983 Settlement Agreement alone was sufficient to bring about the appointment of M&O; similarly, it was also sufficient to delineate the manner of M&O's termination. Tellingly, the power of attorney specifically refers to the settlement provision granting Elaine Steinbeck control over the exploitation of the copyrights without any mention of her right to specifically appoint or terminate M&O.[3] Accordingly, even if the power of attorney expired, this would not effect the provision relating to the discretion to terminate.

M&O argues that the literary agency agreement covering Steinbeck works, if terminable at all, is not terminable by Thomas Steinbeck because, under the 1983 Settlement Agreement, Elaine Steinbeck held the bargained-for contractual right to terminate the literary agency agreement. M&O further argues that regardless of whether the literary agency relationship is irrevocable or not, in the absence of any specific grant of the right to another person, only Elaine Steinbeck's heirs would have the right to terminate M&O. Thomas Steinbeck does not argue contrary to this last point, instead he effectively conceded that "New York law has long recognized that non-personal contractual obligations are indeed descendible . . . ," and that "the death of a party generally does not terminate a contract which is not of a personal nature." Pl.'s Reply Br. 17 (quoting 22A N.Y. Jur., Contracts, 478, citing *In Re Application of Scott*, 234 N.Y. 539 (1922)). However, plaintiff argues that the ability to terminate M&O is not a contractual right, but rather, a personal services contract, which created an agency relationship independent of the power of attorney. His contention, however, is belied by the text of both the 1983 Settlement Agreement and the powers of attorney, because the phrase, "in her sole discretion," found in all of these documents indicate Elaine Steinbeck's ability to use her own judgment regarding appointment and termination. Thomas Steinbeck points to nothing in the agreement that would prevent Elaine Steinbeck from firing M&O if it was in her interests and contrary to the sons' interests or objectives. Restatement Third, Agency §§ 1.01, 2.02 (stating that an agent is one who consents to act on behalf of the principal and is subject to the principal's control).

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[3] The powers of attorney executed by John Steinbeck IV and Thomas Steinbeck provide that:

> [Thomas Steinbeck and John Steinbeck IV] [i]rrevocably appoint Elaine Steinbeck Steinbeck [as their] attorney-in-fact . . . to exercise their rights of renewal and rights to terminate grants to third parties and make new contracts and grants and assignments of copyrights and to negotiate and sign contracts and agreements and otherwise take and authorize action on [their] behalf, directly or through such agents or attorneys-in-fact as she, in her sole discretion, may appoint, all solely with respect to the works of John Steinbeck in which [they] now have or will have renewal or termination rights under the US copyright law.

Thomas Steinbeck Decl., Ex. 2.

Elaine Steinbeck garnered the right to terminate M&O as literary agent for Steinbeck's works, in her sole discretion, as part of a negotiated settlement. Plaintiff cannot now argue that her benefit of the bargain does not subsist. Meanwhile, plaintiff raises no question that his benefit under the negotiated settlement, a one-third, as opposed to a one-quarter, share of royalty distributions for the domestic exploitation of certain Steinbeck works, remains in effect, and is descendible to his would-be heirs. Paragraph 14 of the 1983 Settlement Agreement states that "[t]his Agreement shall bind the Parties and their heirs, successors and assigns." Thomas Steinbeck Decl., Ex. 2. Accordingly, Paragraph 14 is not limited solely to plaintiff's benefit under the settlement agreement.

Moreover, Elaine Steinbeck's sole discretion to terminate M&O is not dependent on the existence of an executed power of attorney; but, even if it were, her power of attorney did not terminate upon her death, because it is most properly characterized as a power coupled with an interest, which does not create an agency relationship. Restatement Third, Agency § 3.12 (1) ("[This power] is given . . . for consideration. It is distinct from actual authority that the holder may exercise if the holder is an agent of the creator of the power"). Unlike a power of attorney that creates an agency relationship, a power of attorney coupled with an interest persists beyond the death of the principal or the agent. Restatement Third, Agency § 3.12 (1); *Id.* cmt. b ("A power may be granted irrevocably for the benefit of its creator as well as the holder."). Therefore, Elaine Steinbeck's sole authority to terminate would continue despite her death, thus preventing plaintiff from lawfully terminating M&O.[4]

Because there is no indication, and plaintiff does not allege, that Elaine Steinbeck made any written or oral grant of the power to plaintiff while she was alive, and she specifically excluded him from her will, he has identified no instance in which the discretion to terminate M&O would inure to his benefit.

M&O's cross-motion for judgment on the pleadings is granted.

Dated: New York, New York
March 31, 2009

SO ORDERED:

George B. Daniels

GEORGE B. DANIELS
United States District Judge

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[4] Plaintiff argues that the power of attorney he gave Elaine Steinbeck is not a power coupled with an interest because she does not own any portion of his one-third interest in royalty distributions from certain copyrights. The interests in the copyrights were such that neither could individually exploit their copyright interests, as the signatures of all three were necessary to execute agreements. The fact that Elaine Steinbeck held no interest in plaintiff's royalty distributions is irrelevant because the undivided copyright, not the royalty distributions, is the "subject matter" of the power of attorney.